

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT NASHVILLE

Assigned on Briefs October 7, 2008

**DONTEZ SHELTON FLOWERS v. STATE OF TENNESSEE**

**Appeal from the Circuit Court for Lincoln County**  
**No. S0700100 Robert Crigler, Judge**

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**No. M2007-02721-CCA-R3-PC - Filed April 3, 2009**

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The petitioner, Dontez Shelton Flowers, appeals the Lincoln County Circuit Court's denial of his petition for post-conviction relief. On appeal, the petitioner argues that: (1) his initial 2005 community corrections sentence was illegal in that it imposed a two-year term of incarceration; (2) the trial court improperly found him guilty of violating his community corrections sentence in that he was not actually on community corrections when he violated one of the terms of the community corrections agreement; and (3) he received the ineffective assistance of counsel as related to his plea of violating community corrections. After reviewing the record, we conclude that the petitioner's first issue was untimely raised and that the other two issues are without merit. Accordingly, we affirm the judgment of the post-conviction court.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed**

D. KELLY THOMAS, JR., J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., and CAMILLE R. McMULLEN, JJ., joined.

S. Craig Moore, Fayetteville, Tennessee, for the appellant, Dontez Shelton Flowers.

Robert E. Cooper, Jr., Attorney General and Reporter; Jennifer L. Bledsoe, Assistant Attorney General; Charles F. Crawford, Jr., District Attorney General; Hollyn L. Hewgley, Assistant District Attorney General, for the appellee, State of Tennessee.

**OPINION**

The record reflects that on July 5, 2005, the petitioner pled guilty as a Range II, multiple offender, to one count each of aggravated assault, robbery, and aggravated burglary, all Class C

felonies; one count of theft of property valued over \$1000, a class D felony,<sup>1</sup> and one count of driving on a revoked license. The trial court imposed concurrent sentences of six years for the Class C felonies, four years for theft of property, and eleven months, twenty-nine days at 75% for driving on a revoked license. The transcript of the sentencing hearing indicates that per the terms of a negotiated plea agreement,<sup>2</sup> the petitioner received a community corrections sentence, with the defendant to serve “two stacked 365[-day] terms of incarceration at 100 percent” and the balance of his term on community corrections probation.

On January 2, 2007, the petitioner pled guilty to violating the terms of his community corrections sentence following a positive drug test administered while the defendant was in jail. Under the terms of a plea agreement, the petitioner agreed to an eight-year sentence. While the transcript of the hearing does not clearly indicate the manner of service, the judgments prepared after the hearing indicated that the defendant was to serve his sentence on community corrections. However, on March 8, 2007, the parties entered an “Agreed Order Correcting Re-Sentencing Judgments” indicating that the petitioner’s community corrections sentence was revoked and that the defendant would serve his eight-year term in the custody of the Department of Correction.

On June 27, 2007, the petitioner filed a pro se petition for post-conviction relief. The post-conviction court appointed counsel, who subsequently filed an amended post-conviction petition. In the petition, the petitioner argued that (1) his initial sentence was illegal in that he was ordered to serve two years in custody, which violates the statutory provision that a community corrections participant can only be sentenced to one year in incarceration; (2) because the trial court ruled that his community corrections sentence would not begin until after he served his two-year sentence of incarceration, he could not have been found guilty of violating his community corrections sentence when he failed a drug screen in the county jail; (3) he received the ineffective assistance of counsel during his initial plea agreement and during the plea agreement in which he admitted to violating the terms of his community corrections sentence<sup>3</sup> in that first counsel failed to investigate the facts of the case and entered into an illegal sentence and that second counsel agreed to an enhanced sentence upon the revocation of the petitioner’s community corrections sentence without consideration of the principles of sentencing.

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<sup>1</sup>We note that the judgment for this offense indicates that the defendant was convicted of theft of property over \$500, a Class E felony. While the indictments for the petitioner’s offenses do not appear in the record, the plea acceptance hearing indicates that the defendant was indicted for, and pled guilty to, Class D felony theft. “[W]hen there is a discrepancy between what is reflected in the sentencing hearing transcript and what is on the judgment form, the transcript controls.” State v. Adrian Porterfield, No. W2006-00169-CCA-R3-CD, 2007 WL 3005349, at \*13 (Tenn. Crim. App. Oct. 15, 2007) (citations omitted); no perm. app. filed.

<sup>2</sup>The petitioner’s plea agreement does not appear in the record on appeal.

<sup>3</sup>The petitioner was represented by two different attorneys during the events which form the basis for this appeal. The attorney who represented the petitioner during his initial plea agreement will be referenced as “first counsel,” while the attorney who represented the petitioner when he pled guilty to violating his community corrections sentence will be referenced as “second counsel.”

The post-conviction court conducted a hearing on October 31, 2007. At the beginning of the hearing, the post-conviction court ruled that the petitioner's claims regarding his initial guilty plea and first counsel's performance in representing the petitioner during this plea were time-barred as the petition was filed over one year after the judgments in that case were entered. Thus, the post-conviction court limited the proof to the petitioner's concerns regarding second counsel's performance in representing the petitioner during his second plea agreement, in which he admitted to violating the terms of his community corrections sentence.

The petitioner testified that his understanding of the initial plea agreement was that he would serve two years in custody and then be released onto community corrections for four years. Thus, he believed that because he was not actually serving a community corrections sentence when he failed the drug screen, he could not have been found guilty of violating community corrections. The petitioner testified that he believed that under the terms of the plea agreement in which he admitted to failing the drug screen, his period of incarceration would remain two years and that his post-incarceration community corrections sentence would be increased from four years to six years. The petitioner insisted that second counsel never talked to him about having to serve the entire eight-year sentence in custody and that he never authorized counsel to enter the agreed order correcting the judgments after the guilty plea. The petitioner said that he would not have entered into the plea agreement had he known that he would have had to serve eight years in custody. He also said that second counsel's statement that his taking the plea was in his best interest was coercive in that counsel did not communicate any other offer to him.

Second counsel testified that he informed the petitioner that the violation of his community corrections sentence could result in the trial court's ordering him to serve a maximum sentence, which he mistakenly informed the petitioner was twelve years.<sup>4</sup> Second counsel told the petitioner that while there was no guarantee that the trial court would impose the maximum sentence, a maximum sentence was a possibility. He also told the petitioner that accepting the eight-year sentence offered by the State was in the petitioner's best interest. Second counsel came to this conclusion because "quite frankly . . . I thought he would receive more time," and because the petitioner had already accumulated pretrial jail credits. Second counsel said that the petitioner freely accepted the State's plea offer and insisted that he did not coerce the petitioner into pleading guilty.

Second counsel denied telling the petitioner that his violation would result in an extended period of community corrections probation. He said that the trial court in which the petitioner was sentenced was not likely to give a "slap on the wrist" to a defendant who violated his community corrections sentence by failing a drug test. Rather, he insisted that he told the petitioner that he would serve the eight-year sentence in custody. He also told the petitioner that while on parole, he would face less supervision than he would while serving community corrections probation.

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<sup>4</sup>Counsel testified that he mistakenly believed that the petitioner was sentenced as a Range I, standard offender, thus making him eligible for sentences of three to six years for his class C felonies. Counsel testified that he mistakenly believed that the petitioner would be eligible for consecutive sentences. Counsel later admitted that the defendant was sentenced as a Range II, multiple offender, thus making the sentencing range for his Class C felonies six to ten years.

On cross-examination, counsel testified that he explained to the petitioner that because the petitioner received a split sentence as part of his community corrections sentence, his failed drug screen would constitute a community corrections violation although he was still incarcerated at the time. He also said that the petitioner did not inform him about his belief that his community correction sentence would not begin until after he was released from the county jail. Counsel said that the judgment forms, which initially indicated that the petitioner would serve his eight-year sentence on community corrections, were not ready at the time the defendant pled guilty to violating community corrections sentence. He also insisted that the petitioner never saw these judgment forms. Counsel insisted that the agreed order correcting the judgments, entered two months after the plea hearing, accurately reflected the eight-year “to serve” sentence agreed upon by the State and the petitioner.

At the conclusion of the hearing, the post-conviction court denied the petition. The petitioner subsequently filed a timely notice of appeal.

## ANALYSIS

### Challenge to Petitioner’s Initial Community Corrections Sentence

On appeal, the petitioner first argues that he is entitled to post-conviction relief because his initial community corrections sentence, which included a two-year sentence of incarceration, was illegal. The State responds that the post-conviction court properly ruled that the allegations in the post-conviction petition regarding the illegality of the sentence and first counsel’s performance associated with the plea agreement were time-barred. We agree with the State.

Tennessee’s Post-Conviction Procedure Act provides that a claim for post-conviction relief must be filed “within one (1) year of the date of the final action of the highest state appellate court to which appeal is taken or, if no appeal is taken, within one (1) year of the date on which the judgment became final, or consideration of such petition shall be barred.” Tenn. Code Ann. § 40-30-102(a) (2006). “As a general rule, a trial court’s judgment becomes final thirty days after its entry unless a timely notice of appeal or a specified post-trial motion is filed.” State v. Pendergrass, 937 S.W.2d 834, 837 (Tenn. 1996) (citing Tenn. R. App. 4(a) and (c)).

There are few exceptions to this limitations period. The Post-Conviction Procedure Act provides that a petition may be filed beyond the expiration of the one-year limitations period if the otherwise untimely claim (1) is based on a constitutional right that did not exist at trial, (2) is based on new scientific evidence, or (3) seeks relief from a sentence that was enhanced because of a previous conviction that was later held to be invalid. Tenn. Code Ann. § 40-30-102(b)(1)-(3). None of these statutory provisions apply in the instant case. Additionally, the one-year limitations period may be tolled based on due process concerns, which dictate that strict application of the statute of limitations may not deny a petitioner a reasonable opportunity to assert a claim in a meaningful time and manner when the failure to file in a timely manner is due to circumstances beyond a petitioner’s control. State v. McKnight, 51 S.W.3d 559, 563 (Tenn. 2001); Williams v. State, 44 S.W.3d 464 (Tenn. 2001); Sands v. State, 903 S.W.2d 297, 301 (Tenn. 1995).

While he does not explicitly state as such, the essence of the petitioner's argument is that an illegal sentence tolls the running of the statute of limitations. He argues that "an illegal sentence can be challenged at any time; there is no one-year limitations period in challenging an illegal sentence." In support of his argument, he cites to the Tennessee Supreme Court's opinion in State v. Burkhart, 566 S.W.2d 871 (Tenn. 1978). However, our supreme court has held that "[a] void or illegal sentence . . . may be challenged collaterally in a post-conviction proceeding when the statutory requirements are met, including the one-year limitations period." Summers v. State, 212 S.W.3d 251, 256 n.3 (Tenn. 2007) (emphasis added) (citing State v. Mahler, 735 S.W.2d 226, 228 (Tenn. 1987); Tenn. Code Ann. § 40-30-102(a)(2006)). Here, the judgments attacked by the petitioner became final on August 5, 2005. The petitioner did not file his initial post-conviction petition until June 27, 2007; as such, the post-conviction court properly concluded that those sections of the petition addressing the petitioner's initial guilty plea were untimely.

Our supreme court has made clear that "the proper procedure for challenging an illegal sentence at the trial level is through a petition for writ of habeas corpus . . . ." Moody v. State, 160 S.W.3d 512, 516 (Tenn. 2005); see also Summers, 212 S.W.3d at 256. There is no habeas corpus statute of limitations. See Hickman v. State, 153 S.W.3d 16, 19-20 (Tenn. 2004). However, the procedural requirements for filing a petition for habeas corpus, codified at Tennessee Code Annotated sections 29-21-101 through 29-21-130, are "mandatory and must be followed scrupulously." Archer v. State, 851 S.W.2d 157, 165 (Tenn. 1993). These procedural requirements were not followed in this case. Therefore, we will not address the petitioner's arguments regarding the alleged illegality of his community corrections sentence and first counsel's performance in negotiating the plea agreement which led to that sentence.

#### Challenges Related to Revocation of Petitioner's Community Corrections Sentence

We next address the petitioner's arguments concerning the revocation of his community corrections sentence. He argues that because he was not on community corrections at the time of his positive drug test, the trial court could not have revoked his community corrections sentence despite his plea to a community corrections violation. He also argues that second counsel was ineffective for failing to explain that his eight-year sentence upon revocation of his community corrections sentence would be served in incarceration and for entering into the sentencing agreement which established this term without his consent. As these assertions relate to the trial court's January 2007 order in which it revoked the petitioner's community corrections sentence and imposed a term of incarceration, the post-conviction petition was timely as to these issues, and we will consider the issues on appeal.

The burden in a post-conviction proceeding is on the petitioner to prove his grounds for relief by clear and convincing evidence. Tenn. Code Ann. §40-30-110(f). On appeal, we are bound by the trial court's findings of fact unless we conclude that the evidence in the record preponderates against those findings. Fields v. State, 40 S.W.3d 450, 456 (Tenn. 2001). Because they relate to mixed questions of law and fact, we review the trial court's conclusions as to whether counsel's performance was deficient and whether that deficiency was prejudicial under a de novo standard with no presumption of correctness. Id. at 457.

Under the Sixth Amendment to the United States Constitution, when a claim of ineffective assistance of counsel is made, the burden is on the petitioner to show (1) that counsel's performance was deficient and (2) that the deficiency was prejudicial. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984); see Lockart v. Fretwell, 506 U.S. 364, 368-372, 113 S. Ct. 838, 842-44 (1993). In other words, a showing that counsel's performance falls below a reasonable standard is not enough; rather, the petitioner must also show that but for the substandard performance, "the result of the proceeding would have been different." Strickland, 466 U.S. at 694. The Strickland standard has been applied to the right to counsel under Article I, Section 9 of the Tennessee Constitution. State v. Melson, 772 S.W.2d 417, 419 n.2 (Tenn. 1989).

A petitioner will only prevail on a claim of ineffective assistance of counsel after satisfying both prongs of the Strickland test. See Henley v. State, 960 S.W.2d 572, 580 (Tenn. 1997). The performance prong requires a petitioner raising a claim of ineffectiveness to show that the counsel's representation fell below an objective standard of reasonableness or "outside the wide range of professionally competent assistance." Strickland, 466 U.S. at 690. In Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975), our supreme court decided that attorneys should be held to the general standard of whether the services rendered were within the range of competence demanded of attorneys in criminal cases. The prejudice prong requires a petitioner to demonstrate that "there is a reasonable probability that, but for counsel's professional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. "A reasonable probability means a probability sufficient to undermine confidence in the outcome." Id. Furthermore, in the context of an allegation that ineffective assistance rendered a guilty plea involuntary, "the petitioner must show 'prejudice' by demonstrating that, but for counsel's errors, he would have not pleaded guilty but would have insisted upon going to trial." Hicks v. State, 983 S.W.2d 240, 246 (Tenn. Crim. App. 1998). Failure to satisfy either prong results in the denial of relief. Strickland, 466 U.S. at 697.

Regarding the trial court's order revoking his community corrections sentence, the petitioner argues that because the conditions of his initial plea were such that his community corrections sentence would not begin until after his two-year term of incarceration ended, he could not have had his community corrections sentence revoked for a positive drug test, a violation of one of his community corrections terms. The petitioner cites to the plea acceptance hearing in which the trial court noted that the petitioner would be "required to serve a total of 730 days at 100 percent. That is two years. . . . After which you will be placed on Community Corrections for the balance of your six year sentence." However, the defendant's assertion is not a cognizable claim under the Post-Conviction Procedure Act, which provides that "[r]elief . . . shall be granted when the conviction or sentence is void or voidable because of the abridgement of any right guaranteed by the Constitution of Tennessee or the Constitution of the United States." Tenn. Code Ann. § 40-30-103. A petitioner may raise post-conviction claims based upon constitutional violations during community corrections revocation proceedings. See Carpenter v. State, 136 S.W.3d 608, 612-13 (Tenn. 2004) (ineffective assistance of counsel); Baker v. State, 989 S.W.2d 739, 741 (Tenn. Crim. App. 1998) (resentencing to term beyond the original range in violation of community corrections statute). However, in this case the trial court's determining whether the facts justified revoking the petitioner's community

corrections term is not a constitutional violation that would entitle the petitioner to seek post-conviction relief.

The petitioner does not assert specifically that trial counsel was ineffective for failing to challenge the trial court's revoking his community corrections sentence. To any extent that such an assertion is tacit in his petition, it is without merit. At the evidentiary hearing the post-conviction court accredited the testimony of second counsel, who testified that he explained to the petitioner before he pled guilty to the community corrections violation that he was bound by the terms of his community corrections agreement while in jail. Counsel also noted that the petitioner never claimed before he entered his plea that he was not bound by the community corrections agreement. Counsel's testimony is supported by the transcript of the hearing at which the petitioner pled to violating his community corrections sentence; at that hearing, the petitioner acknowledged that he was entering his plea freely and voluntarily. We therefore conclude that counsel was not ineffective for declining to challenge the trial court's order revoking the defendant's community corrections sentence.

Regarding the petitioner's arguments that counsel did not explain that the petitioner's eight-year term would be served in incarceration and that he never consented to such a sentence, second counsel testified that he fully explained that the petitioner's eight-year term would be served in incarceration and that the petitioner agreed to the length and manner of this sentence before pleading guilty to the community corrections violation. While the initial judgments prepared in connection with the community corrections revocation and resentencing did not specify the manner of sentence, second counsel testified that the petitioner never saw these judgment forms and that the "agreed order" correcting the judgments entered by second counsel and the State some two months after the revocation hearing accurately reflected the length and manner of sentence which the petitioner agreed to accept. The post-conviction court accredited this testimony and discredited the petitioner's claim that he consented only to a two-year extension of his community corrections sentence, not an eight-year term of incarceration. We agree with the post-conviction court that the petitioner has not established by clear and convincing evidence that counsel's performance was ineffective. Accordingly, we deny him relief on this issue.

### CONCLUSION

In consideration of the foregoing and the record as a whole, the judgment of the post-conviction court is affirmed.

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D. KELLY THOMAS, JR., JUDGE